

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

PATRICK SMITH,

Plaintiff,

v.

CALPIA, et al.,

Defendants.

Case No. 2:24-cv-00117-KJM-JDP (PC)

ORDER

Plaintiff, a state prisoner proceeding pro se, has filed this civil rights action seeking relief under 42 U.S.C. § 1983. The matter was referred to a United States Magistrate Judge as provided by 28 U.S.C. § 636(b)(1)(B) and Local Rule 302.

On October 1, 2024, the Magistrate Judge filed findings and recommendations, which recommended the dismissal of this action without leave to amend. ECF No. 14. The findings and recommendations were served on plaintiff and set a fourteen-day deadline for any objections. *Id.* at 2. Plaintiff objected to the findings and recommendations after that deadline had passed. ECF No. 15. The court has considered the late objections and has reviewed the matter de novo. *See* 28 U.S.C. § 636(b)(1). Plaintiff also filed a notice of appeal of the findings and recommendations. ECF No. 16. That notice does not deprive this court of jurisdiction. *See Serine v. Peterson*, 989 F.2d 371, 372–73 (9th Cir. 1993).

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1 Plaintiff alleges defendants were negligent, but pursues a claim under 42 U.S.C. § 1983.
2 The Magistrate Judge correctly concluded that allegations of negligence cannot support a claim
3 under § 1983. The court adopts that recommendation and dismisses the complaint.

4 The Magistrate Judge recommends dismissal without leave to amend. The court cannot
5 exclude the possibility that plaintiff could assert a viable claim under 42 U.S.C. § 1983, such as a
6 claim based on the Eighth Amendment. *Cf.* Objections at 2 (“Plaintiff in this case was sent to
7 prison as punishment, not for punishment.”). The court therefore permits an amended complaint.
8 *See AmerisourceBergen Corp. v. Dialysist W., Inc.*, 465 F.3d 946, 951 (9th Cir. 2006) (“Rule
9 15(a) is very liberal and leave to amend shall be freely given when justice so requires.” (citation
10 and quotation marks omitted)).

11 Accordingly, IT IS HEREBY ORDERED that:

- 12 1. The findings and recommendations filed October 1, 2024, are **adopted in part** as
13 discussed above;
- 14 2. Plaintiff’s amended complaint, ECF No. 13, is **dismissed with leave to amend**;
- 15 3. Any amended complaint must be filed **within thirty days** of the date plaintiff receives
16 a copy of this order; and
- 17 4. This action is referred back to the assigned Magistrate Judge for all further pretrial
18 proceedings.

19 DATED: December 6, 2024.

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22 UNITED STATES DISTRICT JUDGE
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